Nos. 12070-1

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12070.

MYRON L. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

No. 12071.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., a corporation,

Defendant-Appellee.

Appellee's Reply to Amicus Curiae Brief of the Administrator of the Wage and Hour Division of the Department of Labor.

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INDEX TO BRIEF

PAGE

STATEMENT 1

I.

THE RECORD SHOWS WITHOUT CONFLICT THAT THERE WAS NO CONTRACT, CUSTOM OR PRACICE TO PAY FOR THE STANDBY OR WAITING TIME OF APPELLANTS 4

II.

THE ANSWER DOES NOT SHOW THAT THE STANDBY TIME WAS COMPENSABLE BY EITHER AN EXPRESS PROVISION OF A CONTRACT OR BY CUSTOM OR PRACTICE 10

The Contentions of the Administator Entirely Ignore the Provisions of Subsection (b) of Section 2 of the Portal Act Which Clearly Render the Standby Time for Which Recovery Is Sought in the Instant Cases Non-compensable 13

III.

THE RECORD SHOWING WITHOUT CONTROVERSY THAT THE COURT WAS WITHOUT JURISDICTION OF THE SUBJECT MATTER OF THE ACTION, IT HAD NO OTHER ALTERNATIVE THAN TO DISMISS THE CASE ON THAT GROUND 16

TABLE OF AUTHORITIES CITED IN BRIEF

CASES PAGE

Bateman v. Ford Motor Co., 76 Fed. Supp. 178; aff'd 169 F. 2d 266; cert. den. 93 L. Ed. 247 18

Galvin v. National Biscuit Company, 82 Fed. Supp. 535 15

Green v. Cherokee Motor Coach Co. (not officially reported), 8 WH Cases 277 5

Johnson v. Park City Consolidated Mines Co., 73 Fed. Supp. 852 16

Joshua Hendy Corporation v. Mills, 169 F. 2d 898 4

Kennedy v. Silas Mason Co., 334 U. S. 249 18

McNutt v. General Motors Acceptance Corp., 298 U. S. 178 ..... 6, 16

Newson v. E. I. Du Pont De Nemours & Co., 173 F. 2d 856 5

Tipton v. Berl Sprott Co., 175 F. 2d 432 4

Twigg v. Yale & Towne Mfg. Co., 7 F. R. D. 488 18

Walling v. Fairmont Creamery Co., 139 F. 2d 318 7

MISCELLANEOUS

House Report (Conference Report), 80th Cong., 1st Sess., April 29, 1947 14

STATUTES

Federal Rules of Civil Procedure, Rule 56(e) 7

Portal Act, Sec. 2 5

Portal Act, Sec. 2(b) 13, 14, 15

TEXTBOOKS

3 Moore's Federal Procedure Under the New Rules, p. 3175 7

TOPICAL INDEX TO APPENDIX

PAGE

I.

THE CASES CITED BY THE ADMINISTRATOR DO NOT SUSTAIN HIS CONTENTION THAT EITHER THE ALLEGATIONS OF THE COMPLAINT, OR THE AFFIDAVIT, OR THE PROVISIONS OF BULLETIN A-36 MAKE THE STANDBY TIME COMPENSABLE BY A DIRECT PROVISION OF THE CONTRACT 1

II.

DECISIONS REPORTED SUBSEQUENT TO THE FILING OF OUR BRIEF TO THE EFFECT THAT THE ALLEGATIONS IN THE COMPLAINT ARE NOT SUFFICIENT TO CONFER JURISDICTION, AND THAT EXPRESS CONTRACTS OF EMPLOYMENT CONTAINING PROVISIONS SIMILAR TO BULLETIN A-36 TO THE EFFECT THAT EMPLOYEES ARE TO BE PAID A DEFINITE HOURLY WAGE OR SPECIFIC WEEKLY OR MONTHLY SALARY AND TIME AND A HALF IN EXCESS OF FORTY HOURS PER WEEK, DO NOT MEET THE REQUIREMENTS OF THE PORTAL ACT IN THAT THEY DO NOT SPECIFY THE PARTICULAR ACTIVITIES WHICH ARE TO BE PAID FOR..... 8

III.

ADDITIONAL DECISIONS THAT WHEN LACK OF JURISDICTION APPEARS ON THE FACE OF THE RECORD, IT IS THE DUTY OF THE COURT TO DISMISS THE CASE..... 16

TABLE OF AUTHORITIES CITED IN APPENDIX

Cases

PAGE

Bateman v. Ford Motor Co., 169 F. 2d 266; cert. den. 335 U. S. 902 ..... 16, 17

Battaglia v. General Motors Corporation, 169 F. 2d 254; cert. den. 335 U. S. 887 18

Berkowitz v. All Service Laundry Corp., 87 N. Y. S. 2d 187 ..... 13, 14

Frank v. Wilson & Co., 172 F. 2d 712 ..... 6, 7

Galvin, et al. v. National Biscuit Co., 82 Fed. Supp. 535 ..... 10, 12

Hutchings v. Lando, 83 Fed. Supp. 615 ..... 12, 13

Johnson v. Park City Consolidated Mines Co., 73 Fed. Supp. 852 17

Joshua Hendy Corporation v. Mills, 169 F. 2d 898 ..... 4, 6

Newson v. E. I. Du Pont De Nemours & Co., 173 F. 2d 856 ..... 8, 10

Schelling v. Star Switchboard Company (not yet officially reported), 16 Labor Cases 65,230 15

Tipton v. Bearl Sprott Co., 175 F. 2d 432 ..... 1, 3, 4

Statutes

Portal Act, Sec. 2 ..... 3, 16

Portal Act, Sec. 2(b) 12

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Defendant-Appellee.

Appellee's Reply to Amicus Curiae Brief of the Administrator of the Wage and Hour Division of the Department of Labor.

Statement.

The instant appeals deal solely with the effect of the Portal Act upon the right of the appellants to recover for

standby time occurring during a period long prior to the effective date of that Act, such standby time having also been eliminated prior to the Act.

The Administrator does not reply to our contention that the appellee's affirmative defenses were established as a matter of law (our brief, pp. 58-70) except by stating, without advancing any reason therefor, that those defenses required a trial on the merits. It is understandable that the Administrator might have an interest in the decision of this Court on the questions presented by those defenses, especially as two of them dealt with the acts of the Administrator. It is therefore significant that he does not attempt any answer to our contentions, (1) that his Administrative Bulletin 13, even after its revision following the *Skidmore* and *Armour* cases, justified the conclusion that in the factual situation of the instant cases appellants' standby time was non-compensable even before the Portal Act (our brief, pp. 62-3); (2) the appellee was clearly entitled to rely upon the actions of the Administrator's deputy for Southern California (our brief, pp. 64-5); (3) the obvious right of the defendant to rely upon the actions of the War Labor Board.

As we analyze the Administrator's brief, his position that the Court erred in dismissing for want of jurisdiction rests upon two contentions:

> (1) That the averments of the complaint and the appellants' affidavit showed that the appellants' standby time was made compensable by contract;
>
> (2) That the defendant's answer also showed it to be so compensable.

The Appendix attached hereto contains an analysis of all cases cited by the Administrator and a number of additional authorities relied on by us, the majority of them decided after the filing of our brief.

We shall use the same designations as in our brief on file, referring to that brief by the letters "O. B.," meaning "our brief," to the *amicus curiae* brief by the letters "A. C. B.," and to the Appendix attached to this brief as "Ap.-2," the Appendix to our brief already on file being referred to as "Ap."

All emphasis in this brief and in Ap.-2 will be ours unless otherwise noted.

I.

The Record Shows Without Conflict That There Was No Contract, Custom or Practice to Pay for the Standby or Waiting Time of Appellants.

At the outset, it is to be noted that the *amicus curiae,* as well as the appellants, discuss only the appeals of what we have denominated the "resident employees." No attempt is made to discuss the validity of the judgment of dismissal as to the primary service men, or to answer the portions of our brief (pp. 14-19) in which we show that in no event did the Court have jurisdiction as to them. Hence we shall confine our discussion to the appeal of the resident employees.

As we read the *amicus curiae* brief, it is contended that, for the purpose of jurisdiction, the record contained sufficient showing that the standby time was compensable because so alleged in the complaint and in the affidavit filed in support of appellants' motion for partial summary judgment.

The allegation in the complaint, which is quoted on page 5, A. C. B., is a mere conclusion that the plaintiffs were employed for forty hours a week and "in addition thereto were to receive additional compensation at one and one-half times their regular hourly rate for all hours worked in excess of forty hours in each work week."

The Administrator cites *Tipton v. Bearl Sprott Co.* (C. C. A. 9), 175 F. 2d 432, and *Joshua Hendy Corporation v. Mills* (C. C. A. 9), 169 F. 2d 898, to the effect that the allegation was sufficient to show jurisdiction. The cases are analyzed in Ap.-2, pages 1 to 6, where it is shown that neither sustains the contention.

As pointed out in O. B., page 12, so far as we are advised, every court that has considered such an allegation has held it is not sufficient to meet the requirements of Section 2 of the Portal Act. This, for the reason that a written contract which promises to pay overtime for work in excess of forty hours a week without specifying the particular activity for which overtime is to be paid does not meet the requirements of the Act, that *there must be an express provision of a contract* or a custom or practice to pay *for the particular activity for which recovery is sought*. See cases collated pages 129 to 137 of the Appendix and additional cases Ap.-2, pages 8 to 15. The Portal Act prohibits the recovery for any activity unless it is made compensable, not by a contract, but by *"an express provision* of a written or nonwritten contract. . . ."

As stated by the District Court in *Green v. Cherokee Motor Coach Co.* (not officially reported), 8 WH Cases 277, 280, cited by the Administrator:

> *"It is not a question of whether there was a contract or custom to pay overtime.* The question is whether there was a *contract or custom to compensate the employee for activities performed."*

Directly in point is the recent decision of the Sixth Circuit in *Newsom v. E. I. Du Pont De Nemours & Co.* 173 F. 2d 856 (digested and quoted from extensively in Ap.-2, p. 8), wherein the Court, in holding that a contract containing the precise averments as in the instant

case was insufficient to sustain recovery for preliminary and postliminary activities, said in part:

> "In order that activities be expressly compensable under this provision they must be specifically described. *A contract which does not refer to and specify the activities for which compensation is to be made does not bring the exception into force.*"

But even if the allegation of the complaint could be held technically sufficient, it could not defeat a motion where the record clearly and without contradiction shows there was no contract to pay for such activities. As stated by the Supreme Court:

> "The trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, *'inquire into the facts as they really exist.'*"
>
> *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 184.

Amicus curiae quotes the affidavit of appellants wherein, after detailing their duties, it is stated that prior to the original Act they were paid only straight time, and that after the Act an order issued by the defendant went into effect wherein it was agreed they would perform their services at a stipulated monthly salary and receive overtime for all hours in excess of forty per week. It is urged that the affidavit precluded the Court from deciding it was without jurisdiction of the action and requires it to give the immense amount of time and put the parties to the enormous expense that would have been involved in a trial on the merits.

There are three separate conclusive reasons why the affidavit cannot be given that effect:

First, the affidavit is insufficient under Rule 56(e), which requires the contract to be attached or set out in the affidavit.

As observed by the Eighth Circuit Court of Appeals:

"When written documents are relied on, they must be exhibited in full. *The statement of the substance of written instruments or of affiant's interpretation of them or of mere conclusions of law or restatements of allegations of the pleadings are not sufficient.* Rule 56(e), Rules of Civil Procedure; 3 Moore's Federal Procedure Under the New Rules, p. 3175 *et seq.*"

Walling v. Fairmont Creamery Co. (C. C. A. 8), 139 F. 2d 318, 322.

Second, a statement that employees are to be paid time and a half for services in excess of forty hours does not show that the parties agreed that any particular service was compensable. (See O. B., p. 12; Ap., pp. 129-137, Ap.-2, pp. 8 to 15, and cases there cited.)

Third, the appellants' answers to the interrogatories expressly stated that the contract on which they relied was Operating Order A-36 [Exs. 1 and 2, R. 171], thereafter referred to in our brief and herein as the "bulletin," and upon custom and practice.

The effect of this bulletin has been very fully discussed, with record citations, on pages 28 to 34 of O. B. As there pointed out, the bulletin merely promised to pay overtime for work in excess of forty hours without designating what constituted "work" or what activities were compensable. As heretofore pointed out, all the authorities hold that such a contract does not meet the requirements of the Portal Act in that it does not specify what activities constitute work or were to be paid for. (See Ap., pp. 129-137; Ap.-2, pp. 8 to 15.]

The record not only does not show that there was any contract or custom to pay for the standby time, but affirmatively discloses precisely the contrary.

The record shows that while the appellants claim they had a definite eight hour shift, for which they were paid their monthly salary, the defendant claimed they had no specific time within which to perform their services, except that they were supposed to execute them in the daytime between the first call to the switching center in the morning and the last call in the afternoon, the time between such calls, with an hour out for lunch, being eight hours. Regardless of which contention is correct, the record without controversy shows that after the last call to the switching center, which appellants claim was the end of their shift, except for the requirement of remaining within hearing of the alarm bell, they were free to do as they pleased. This, the appellants concede in their affidavit, from which we quote:

> "After eight hours the substation operators considered themselves free from routine duties but under-

> stood that they were still, for the balance of the 24-hour work day, in the employ of the defendant company." [R. 304.]

It was also uncontroverted that they reported eight hours of work whether they performed that much or not, and only reported as overtime emergency services performed during nighttime hours, and the sixth day when Southern California was on a forty-eight hour week. "Nighttime hours" for the substation men were between 6:00 P. M. and 8:00 A. M., and for the hydro employees between the last call to the switching center in the afternoon and the first call in the morning. Appellants were paid a monthly salary and overtime for emergency services performed during the nighttime hours, the hourly rate to their knowledge being figured on the assumption that their salary was applicable to forty hours of work a week. Appellants neither requested, expected or received any other compensation (O. B., pp. 28-34).

While the Administrator asserts generally that there is much contradiction in the affidavits of the parties, he makes no effort to show that the above facts were controverted, or that any factual dispute between the parties was not on issues wholly immaterial to the question of the Court's jurisdiction.

We submit that the suggestion that the record contained any evidence to support the claim that the standby time was made compensable by an express provision of a contract or by custom or practice is wholly devoid of merit.

II.

The Answer Does Not Show That the Standby Time Was Compensable by Either an Express Provision of a Contract or by Custom or Practice.

The next contention of the Administrator is that the answer shows that appellants' standby time was compensable. The point is one which is not raised by the appellants; in their opening brief the appellants state:

> "The defendant, by its answer to the third amended complaint, *denied the material allegations thereof* and asserted the following affirmative defenses: (a) that there was an understanding between the parties that the monthly salary was to be the only compensation for all services rendered by the employees except for so-called 'emergency service.'" (App. Br., p. 6.)

No fair or reasonable interpretation of the answer supports the Administrator's contention.

In Paragraph IV of the complaint it is alleged that the plaintiffs were employed on a monthly salary, *based on forty hours of work each week* [R. 107-8]. Paragraph III of the answer denied that the contract of employment was as alleged. The answer then sets forth in detail the various classes of resident employees and their respective duties, and that their services and the time taken to perform them was much less than eight hours per day, but that their salary was paid to them *on the theory that their services were the equivalent of forty hours of active service,* in addition to which they were paid at least time and a half for emergency services performed during the nighttime hours hereinbefore defined [R. 137-149]; that in computing the hourly rate for such overtime services the salary was computed on the basis of being applicable to

forty hours of work per week [R. 141]. In the second defense to the complaint it was specifically alleged that there was no contract or custom or practice to pay for the said standby time [R. 153-154].

Thus the plaintiffs allege that they were employed and paid a salary for a definite eight hour shift, for which their monthly salary was paid them. The defendant alleges that, while they had no definite time in which to perform their services, they were paid for eight hours of work per day for a five day week; it being undisputed that when they worked the sixth day they were paid time and a half for eight hours, whether they performed that amount of work or not. Thus it is apparent that the controversy between the parties is one of terminology.

If it could be held that there was any difference in substance between the pleadings, clearly the plaintiffs must elect on which alleged contract of employment they seek to recover. If they elect to accept the contract as alleged by the defendant, it is certain they would be out of court, because that contract shows they had not put in forty hours of work. If the case is to be reversed because of any deficiency of the answer, there would be the rather anomalous situation of a reversal *to enable the plaintiffs to disprove their own averments and prove the truth of the averments of the defendant.*

However, as noted, the answer specifically denied that standby time had been made compensable by any express provision of a contract or by custom or practice [R. 154]. If that specific portion of the answer can be ignored—and it cannot—and if the Administrator's contention (not advanced by the appellants) could be sustained, there would be no case in which postliminary and preliminary activities would not be compensable. Where an employer required its employees to be upon the premises for any length of time, either before or after the starting of a shift, either to prepare for work or in cleaning and repair-

ing equipment and putting it in shape afterwards, the hourly, weekly or monthly rate of pay agreed on must of necessity take into consideration and be based not only upon active services rendered, but the time of the employees in such preliminary and postliminary activities. We believe that was one of the motivating theories on which it was held in the series of decisions resulting in the Portal Act that such activities were "work" within the meaning of the original Act. However, the quite conclusive fact (not commented on by the Administrator or, for that matter by the appellants in their reply brief) is that the statute does not permit a recovery upon a showing that the activity was impliedly made compensable by a contract, but only where it is compensable *"by an express provision of a written or nonwritten contract * * *."*

As pointed out in our brief, that specific provision was inserted by Congress to bar recovery in cases precisely of the character of the instant case. Congress undoubtedly knew that if it merely provided that the services should be compensable by contract or practice or custom, that the word "contract" would be construed as applying to an implied contract, and in most, if not all, cases postliminary and preliminary activities, on the theory which the Administrator urges, could be held to be compensable by an implied contractual obligation. Hence the requirement that before there can be a recovery for such activities it must be shown they were made compensable not by a contract, but *"by an express provision of a contract."*

Clearly the defendant's answer cannot by any tortured construction be interpreted as alleging that standby time during the nighttime hours was made compensable by any *express provision* of a contract between the parties, even if the Court could,—as it cannot,—disregard the express averments of the answer that said standby time was not compensable by any provision of the contract or by custom or practice.

As emphatically as possible we would call special attention to O. B., page 27, in which we set forth the portion of the Congressional debates *showing conclusively* that Congress expressly intended to bar recovery in precisely the situation of the instant case, and that the Administrator, and for that matter appellants in their reply brief, have ignored that all conclusive portion of the Congressional Record.

THE CONTENTIONS OF THE ADMINISTRATOR ENTIRELY IGNORE THE PROVISIONS OF SUBSECTION (b) OF SECTION 2 OF THE PORTAL ACT WHICH CLEARLY RENDER THE STANDBY TIME FOR WHICH RECOVERY IS SOUGHT IN THE INSTANT CASES NON-COMPENSABLE.

The Administrator and for that matter the appellants entirely ignore the provisions of subparagraph (b) of Section 2 of the Act, which reads:

> "(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice *only when it was engaged in during the portion of the day with respect to which it was so made compensable.*"

There can be no question but that this provision was inserted in the Act for the express purpose of preventing recovery in a situation such as that presented in the instant cases. The only dispute in the record is as to whether during the period between their first and last call to the switching center, which appellants claim to be an eight hour shift, appellants were usually fully occupied in performing their duties or whether, as defendant con-

tends, only a small portion of that time was required for the discharge of their active duties. Recovery is not sought for any standby time during those hours but for the sixteen hours resulting from their being required to live on the premises,—in other words, for the time which they spent in their homes with their families between the last call to the switching center and the first call in the morning. There is not the slightest contention that during that period appellants were required to perform any active duties except in case of an emergency. For such emergency services appellants concede they were paid at least time and a half.

By no stretch of the imagination or tortured method of construction can the answer of the defendant be construed as intimating or suggesting that their standby time during the nighttime hours was compensable by contract, custom or practice.

It is clear, not only from the Congressional Debates set out in the Appendix (pp. 1-14) and in our brief (O. B., p. 27), that the Portal Act was especially designed to bar recovery for such activities and that subsection (b) was inserted for the express purpose of guarding against recovery in a situation such as the instant case.

In the Conference Report on this bill to the House (H. R., 80th Congress, First Session, April 29, 1947) special attention is called to Section 2(b) as follows:

> "The conference agreement (section 2(b)) contains a provision not stated expressly in either bill, that an activity shall be considered as compensable under the above referred to contract provision or custom or practice only when it was engaged in during the portion of the day with respect to which it was

so made compensable. Under this provision, for example, if under the contract provision or custom or practice an activity was compensable only when engaged in between 8 and 5 o'clock but was not compensable when engaged in before 8 or after 5 o'clock, *it will not be considered as a compensable activity when engaged in before 8 or after 5 o'clock.* So also, if under the contract provision or custom or practice an activity was compensable when engaged in before 8 but was not compensable when engaged in after 5 o'clock, it will not be compensable under the bill as agreed to in conference *when engaged in after 5 o'clock.*"

We submit that subdivision (b) of Section 2 fits the instant case like a glove and bars recovery for the standby time sought in this case. In this connection, it must be borne in mind that there is no question presented as to standby time during the period between the first and last calls to the switching center which the appellants claim was a definite shift. The suit is concededly for the standby time in remaining upon the premises during the nighttime hours. The recent decision by the District Court of New York in *Galvin v. National Biscuit Company,* 82 Fed. Supp. 535 (digested Ap.-2, p. 10), is directly in point.

It is crystal clear not only from the pleadings but the entire record that neither party prior to the decisions in the *Skidmore* and *Armour* cases imagined that the standby time after the end of the shift or the last call to the switching center was, as such, compensable. To allow a recovery is clearly a windfall compensation, to bar recovery for which the Portal Act was passed (see O. B., p. 27).

III.

The Record Showing Without Controversy That the Court Was Without Jurisdiction of the Subject Matter of the Action, It Had No Other Alternative Than to Dismiss the Case on That Ground.

The Administrator repeatedly asserts that the record shows there were controverted issues between the parties, and cites a number of decisions to the effect that summary judgment should not be granted where there is any conflict as to any material issue. The cases need not be commented on. The principle is axiomatic, but is inapplicable to the instant case, for the reason that *the only fact upon which there is any dispute is in no wise material to the issue of jurisdiction.*

Further, summary judgment was not rendered but the case *dismissed for lack of jurisdiction.* It is axiomatic that it is a prerequisite to a District Court proceeding with a cause that at all times its jurisdiction of the subject matter of the action clearly appear on the face of the record, and where it is questioned, the plaintiff must show the existence of facts necessary to confer jurisdiction upon the Court. See *McNutt v. General Motors Acceptance Corporation, supra,* 228 U. S. 178, 181, *et seq.,* Ap. pp. 124-125.

The observation of the Federal District Court of Missouri, in *Johnson v. Park City Consolidated Mines Co.,* 73 Fed. Supp. 852-857, quoted from at length in our Ap.-2, is most appropriate:

> "If plaintiffs can prove a contract or custom as called for by the amended Act *it should not be kept secret until the trial. Likewise if they cannot produce such evidence that should not be kept secret until the trial.*"

It is not true, as suggested by the Administrator, that the issue of jurisdiction was summarily disposed of. The record shows that appellants were accorded every opportunity to make a showing, if they could, that there was a contract or custom or practice to pay for their standby time during the nighttime hours. There were two pretrial hearings, depositions of twelve of the appellants taken, interrogatories propounded by the respective parties to each other and answered. No trial on the merits, no matter how protracted, could have changed the following facts which are established by the present record without controversy: (1) That the appellants, by their answer to interrogatories, state that the contract was partly written and partly custom and practice, that the written part consisted of Bulletin A-36; (2) that Bulletin A-36 was a promise to pay time and a half for hours worked in excess of forty hours per week, but did not specify what constituted work or what activity was compensable; (3) that appellants had been paid a monthly salary, which they allege was for a definite eight hour shift; (4) that appellants always reported eight hours of work whether they performed that many or not, and as overtime any emergency service performed during the nighttime hours for which they were paid time and a half, their hourly rate being computed on the theory that their salary was applicable to forty hours of work per week; (5) appellants never asked for or received other compensation.

We submit that the District Court could have reached no other conclusion than that it did not have jurisdiction of the subject matter of the action. That decision of the

District Court, of course, is binding upon this Court *unless the record clearly shows that it was erroneous.*

As repeatedly pointed out, it was to avoid the useless waste of the time of the Court, which in the instant cases probably would be many months, and the enormous expense to the parties that would result from a trial of cases of this character, that Congress withdrew jurisdiction from all Courts of suits for overtime compensation based upon activities not made compensable by an express provision of a contract or by custom and practice.

The observations of Judge Picard in *Bateman v. Ford Motor Co.* (Mich.), 76 Fed. Supp. 178, 180 (affirmed 169 F. 2d 266, cert. denied 93 L. Ed. 247), are most pertinent. There, after pointing out that on a retrial of the *Mount Clemens* case, the Court had found the dressing time to be within the *de minimis* rule, said:

> "Congress, therefore, knowing the peril to be imminent, concluding that it could not await the usual turning of the wheels of justice, determined that the courts be relieved of the burden of *'excessive and needless litigation and champertous practices' and business relieved of a heavy burden of doubt. In remedy it amended the Fair Labor Standards Act by the Portal-to-Portal Act, . . .*"

See, also, Ap. XII, page 150, and Ap.-2, page 16, and cases collated.

The Administrator cites, as do appellants, *Kennedy v. Silas Mason Co.,* 334 U. S. 249, and *Twigg v. Yale & Towne Mfg. Co.,* 7 F. R. D. 488. In the first case the decision was based largely on the fact that an incomplete record had been presented to the Court and that a sum-

mary judgment should not be granted in a complex case where the factual situation was uncertain and indefinite. The second case held that where the record showed that the right of recovery depended upon a conflict in the evidence so that it could not be said as a matter of law that the plaintiffs could or could not recover, the Court should withhold its determination as to its jurisdiction under the Portal Act for a trial on the merits.

In the instant cases the record is neither complex nor the factual situation uncertain or indefinite. The record is voluminous only because of the number of plaintiffs, there actually being seventy-three or more separate lawsuits joined in the two actions.

We submit that as a matter of common sense and justice a record cannot be said to be confused or indefinite merely because the essential facts are established by various and sundry documents contained in the record, such as the affidavits of the parties, depositions, and answers to interrogatories, or because the action is brought by numerous employees. Otherwise, in a wage and hour case a summary judgment or dismissal for want of jurisdiction could always be avoided by joining a large number of employees as parties plaintiff.

In conclusion, we cannot refrain from suggesting that it seems to us that the Administrator's interest in any litigation affecting the Portal Act or the Wage and Hour Act should be limited to questions of law which might affect the proper administration of those Acts. In the instant cases the only questions of that character are the affirmative defenses, two of them resting upon the Administrator's own acts. The Administrator, however, in-

stead of attempting any reply to our discussion of those defenses has confined his brief entirely to a question which, it seems to us, is one in which only the parties can properly be interested, viz.: whether or not there is a factual dispute disclosed by the record sufficient to require a trial upon the merits.

We respectfully but confidently submit that the judgment of dismissal for lack of the Court's jurisdiction must be affirmed.

All of which is respectfully submitted.

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TOPICAL INDEX TO APPENDIX

PAGE

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THE CASES CITED BY THE ADMINISTRATOR DO NOT SUSTAIN HIS CONTENTION THAT EITHER THE ALLEGATIONS OF THE COMPLAINT, OR THE AFFIDAVIT, OR THE PROVISIONS OF BULLETIN A-36 MAKE THE STANDBY TIME COMPENSABLE BY A DIRECT PROVISION OF THE CONTRACT 1

II.

DECISIONS REPORTED SUBSEQUENT TO THE FILING OF OUR BRIEF TO THE EFFECT THAT THE ALLEGATIONS IN THE COMPLAINT ARE NOT SUFFICIENT TO CONFER JURISDICTION, AND THAT EXPRESS CONTRACTS OF EMPLOYMENT CONTAINING PROVISIONS SIMILAR TO BULLETIN A-36 TO THE EFFECT THAT EMPLOYEES ARE TO BE PAID A DEFINITE HOURLY WAGE OR SPECIFIC WEEKLY OR MONTHLY SALARY AND TIME AND A HALF IN EXCESS OF FORTY HOURS PER WEEK, DO NOT MEET THE REQUIREMENTS OF THE PORTAL ACT IN THAT THEY DO NOT SPECIFY THE PARTICULAR ACTIVITIES WHICH ARE TO BE PAID FOR 8

III.

ADDITIONAL DECISIONS THAT WHEN LACK OF JURISDICTION APPEARS ON THE FACE OF THE RECORD, IT IS THE DUTY OF THE COURT TO DISMISS THE CASE 16

TABLE OF AUTHORITIES CITED IN APPENDIX

Cases

Bateman v. Ford Motor Co., 169 F. 2d 266; cert. den. 335 U. S. 902 ..... 16, 17

Battaglia v. General Motors Corporation, 169 F. 2d 254; cert. den. 335 U. S. 887 18

Berkowitz v. All Service Laundry Corp., 87 N. Y. S. 2d 187 ..... 13, 14

Frank v. Wilson & Co., 172 F. 2d 712 ..... 6, 7

Galvin, et al. v. National Biscuit Co., 82 Fed. Supp. 535 ..... 10, 12

Hutchings v. Lando, 83 Fed. Supp. 615 ..... 12, 13

Johnson v. Park City Consolidated Mines Co., 73 Fed. Supp. 852 17

Joshua Hendy Corporation v. Mills, 169 F. 2d 898 ..... 4, 6

Newson v. E. I. Du Pont De Nemours & Co., 173 F. 2d 856 ..... 8, 10

Schelling v. Star Switchboard Company (not yet officially reported), 16 Labor Cases 65,230 15

Tipton v. Bearl Sprott Co., 175 F. 2d 432 ..... 1, 3, 4

Statutes

Portal Act, Sec. 2 ..... 3, 16

Portal Act, Sec. 2(b) 12

APPENDIX.

I.

The Cases Cited by the Administrator Do Not Sustain His Contention That Either the Allegations of the Complaint, or the Affidavit, or the Provisions of Bulletin A-36 Make the Standby Time Compensable by a Direct Provision of the Contract.

Tipton v. Bearl Sprott Co. (C. C. A. 9), 175 F. 2d 432.

This is the first case that the Administrator cites to the effect that the allegations of the complaint are sufficient to show that the standby time was compensable by a direct provision of the contract and that the affidavit and the provisions of Bulletin A-36 likewise established that fact. The decision does not at all sustain the point to which it is cited.

The action was by employees of a cafeteria, it being alleged that the defendant operated the cafeteria at all times in connection with a plant of the Columbia Steel Company which was manufacturing steel and selling the same in commerce. It was alleged specifically that the maintenance of this cafeteria was a necessary and essential adjunct to the manufacture of steel by Columbia. It was then alleged that the plaintiff employees had been required to perform more than 40 hours of service per week without being paid time and a half for the services in excess of 40 hours. The nature and character of the services in excess of 40 hours were not alleged.

The jurisdiction of the Court was not challenged by motion or otherwise, but the suit was dismissed on the ground that it did not state a claim upon which relief could be granted, this on the theory that the averment

that the maintenance of the cafeteria was necessary to the manufacture of steel as a matter of law was incorrect. The decision of this Court was to the effect that it could not be declared, as a matter of law, that the averments that the cafeteria was maintained as a restaurant and a necessary adjunct to the manufacture of steel were untrue.

The Court pointed out on trial that the plaintiff would have the burden of establishing the fact and that he could not maintain the action.

The Administrator insists that this portion of the decision is equally applicable to the instant cases and the appellants on the trial of the merits will be required to maintain the burden of showing the necessary jurisdictional facts. Reflection will show, however, the difference between the cited case and the instant cases. In the cited case there was a general allegation that the maintenance of a cafeteria was a necessary incident to the manufacture of steel. That general allegation did not disclose the probative facts in support of or against the averment. In the instant cases all of the essential facts on the issue of jurisdiction appear without controversy. As pointed out in the brief, no trial on the merits could change the facts which are established by the answers to the interrogatories, the depositions of appellants and appellants' affidavits.

In the cited case this Court held that the District Court should, on its own motion, have dismissed the case for want of jurisdiction, because of the failure of the complaint to allege the specific services for which compensation was being recovered and facts showing that

such services were made compensable by either an express provision of a contract, or by custom or practice, this Court saying on this issue:

> "There was, however, a valid ground for dismissing the third amended complaint—a ground not suggested to or considered by the District Court. This will now be discussed."
>
> *Tipton v. Bearl Sprott Co.* (C. C. A. 9), 175 F. 2d 432, 436.

After setting forth the provisions of Section 2 of the Portal Act, the Court continued:

> "As indicated above, this action was instituted by appellants against appellees (the alleged employers of appellants) to enforce the alleged liability of appellees under the Fair Labor Standards Act of 1938 for and on account of their alleged failure to pay appellants overtime compensation for and on account of alleged activities of appellants engaged in prior to May 14, 1947. The third amended complaint did not allege that such activities were compensable by an express provision of a written or nonwritten contract in effect at the time of such activities, between appellants, their agent or collective-bargaining representative and appellees, or by a custom or practice in effect at the time of such activities, at the establishment or place where appellants were employed, covering such activities, not inconsistent with a written or nonwritten contract, in effect at the time of such activities, between appellants, their agent or collective-bargaining representative and appellees, or that such activities were engaged in during the portion of the day with respect to which they were so made compensable.

"Thus the third amended complaint failed to state a claim of which the District Court had jurisdiction. *It should have been dismissed on that ground. That the District Court's jurisdiction was not challenged is immaterial.*

"We are advised that, if granted leave to file a fourth amended complaint, appellants can and will allege all necessary jurisdictional facts. Such leave should be granted."

Tipton v. Bearl Sprott Co. (C. C. A. 9), 175 F. 2d 432, 436-437.

Joshua Hendy Corporation v. Mills (C. C. A. 9), 169 F. 2d 898.

That case was also relied upon by the appellant and has been analyzed on pages 29-30 of its brief.

The suit was by a personal representative of a deceased employee of the appellant. The opinion shows that the decedent was employed as an engineer; that he worked on two shifts, one the graveyard shift, which was 7½ hours, and the other the day shift, which was 8 hours. It was alleged and conceded that decedent was employed for 6 days a week and on the 6th day was paid time and a half for 8 hours. It was alleged, however, that he worked 3 additional hours, for which he received no compensation. The union contract provided for overtime for time and a half for more than 40 hours per week and provided also that employees have one-half hour lunch time on their own time. The averment that Mills had worked 51 hours per week was based on the allegations and proof that he was not furnished a half-hour for lunch, but that he had to eat his lunch while engaged in discharging his regular duties, the evidence showing that, because appellant deemed it impractical, decedent was not furnished a relief

man at his lunch hour and hence was compelled to stay at his desk where he could watch the boilers and adjust them, eating his lunch as he was able to during the performance of his duties. In other words, instead of being given a half-hour of entire relaxation during his lunch time, he was compelled to work through the day shift, or 8½ hours per day.

The District Court allowed him a recovery for his entire time. This Court modified the judgment by disallowing any overtime for his graveyard shift, holding that the record showed that during the time he was on that shift he had not worked more than 48 hours a week and had been paid time and a half for 8 hours of overtime, but that the record showed that on the day shift he had worked 51 hours a week and had been paid overtime only for 8 hours and, therefore, was entitled to time and a half for the three extra hours per week, saying on this, in part:

> "The day shift work presents a different situation. Mills actually worked three hours each week for which he received no compensation. He worked 51 hours, received 40 hours straight time pay and 8 hours overtime pay.
>
> * * * * * * * *
>
> "The lunch period provisions of the contract could have no application to the engineers since, during the time they were on shift, no 'employees' time' could be found in which they could eat lunch. Section (c) of paragraph 5 obviously refers to those employees only who ate lunch on their own time. It is paragraph 4 of the contract which renders the Portal-to-Portal Act inoperative. That paragraph, it will be noted, establishes the work week at 40 hours straight time and 8 hours overtime and further provides for

> the payment of overtime for all 'work performed' in excess of 40 hours per week. Mills performed 11 hours work in excess of 40 hours within the meaning of the phrase 'work performed.' He was paid for 8 hours overtime only."
>
> *Joshua Hendy Corporation v. Mills* (C. C. A. 9), 169 F. 2d 898, 899, 900.

It is to be especially noted that the case presents no issue at all similar to that involved in the instant case. There was no question of standby time, nor was there any question of the extra services being performed at a time during which they were not made compensable. It was a simple case of an employee being required to work for 6 days a week, steadily performing exactly *the same services* for 8½ hours, and for 5 days a week being paid straight time for only 8 hours, and for the sixth day time and a half for the extra 8 hours, leaving a half hour for six days uncompensated for.

> *Frank v. Wilson & Co.* (C. C. A. 7), 172 F. 2d 712.

On page 7 of the Administrator's brief this case was cited as following the *Joshua Hendy Corporation v. Mills* case, *supra,* and it is stated that it involved a situation quite similar to the instant case. The slightest examination will show that the case does not sustain the Administrator's contention and bears no resemblance to the instant cases. The suit was for overtime for changing their clothes after and preparatory for work. The union contract provided for an 8-hour shift for 5 days a week for a specified compensation, and for time and a half for any work in excess of 40 hours per week. It was alleged and shown by the evidence that the employees

worked 8-hour shifts starting at 8:00 o'clock in the morning and were required to be dressed and report for and commence work five minutes before the whistle started. The District Court held that they had, therefore, been shown to have been doing actual work for 8 hours and 5 minutes per day and rendered judgment for plaintiffs.

On appeal it was contended that under the Portal Act the Court was without jurisdiction of the five minutes per day for which overtime was sought, and in denying it the Court said in part:

> "The trial court found that the plaintiffs were required to commence their usual activities five minutes before the time defendant computed the start of their working day for payroll purposes.
>
> * * * * * * * *
>
> "We are bound by the finding of the district court that the plaintiffs were required to work five minutes in excess of the eight regular hours on each of the days indicated by the time cards in evidence (as compiled in the stipulation). We conclude that the activities of the plaintiffs were covered by an express provision of a written contract, and that the Portal-to-Portal Act of 1947 is not a bar to maintaining this action."
>
> *Frank v. Wilson & Co.* (C. C. A. 7), 172 F. 2d 712, 715.

It will be noted here again that this was a case where the employees were required to actually and continuously perform precisely the same services for more than 40 hours per week. It did not involve in any sense standby time or any preliminary or postliminary activities.

However, in the case cited, the judgment of the District Court was reversed on the ground that the time involved came within the *de minimis* rule.

II.

Decisions Reported Subsequent to the Filing of Our Brief to the Effect That the Allegations in the Complaint Are Not Sufficient to Confer Jurisdiction, and That Express Contracts of Employment Containing Provisions Similar to Bulletin A-36 to the Effect That Employees Are to Be Paid a Definite Hourly Wage or Specific Weekly or Monthly Salary and Time and a Half in Excess of Forty Hours Per Week, Do Not Meet the Requirements of the Portal Act in That They Do Not Specify the Particular Activities Which Are to Be Paid for.

Newsom v. E. I. Du Pont De Nemours & Co. (C. C. A. 6), 173 F. 2d 856, 859, 860 (decided April 14, 1949).

Action for preliminary and postliminary activities, dressing, walking time, etc., filed after the *Mount Clemens* decision and before the Portal Act. After the effective date of that statute, the plaintiffs amended to allege that by an agreement between the union and the company any work over forty hours a week should be compensated for at time and a half, it being alleged that the contract provision with reference thereto was as follows:

> "(a) Time and one-half will be paid to hourly roll employees:
>
> "1. For hours worked in excess of eight (8) when more than eight (8) hours are worked consecutively except that, when an employee receives overtime premiums under Company rules for work prior to the start of his regularly scheduled work period, overtime premiums for hours worked in excess of eight (8) will be off-set by the overtime premiums payable under such Company rules."

After an answer had been filed to this complaint the District Court dismissed it for lack of jurisdiction of the subject matter. In sustaining this decision, the Sixth Circuit Court of Appeals said (a small portion of the first part of the quotation being set out in our brief):

> "In order that activities be expressly compensable under this provision they must be specifically described. A contract which does not refer to and specify the activities for which compensation is to be made does not bring the exception into force. It is undisputed on this record that the parties, in executing the contract of September 2, 1944, did not contemplate that the activities described in the complaint should be paid for. Such activities, at that time and always, prior to the decision in Tennessee Coal, Iron & Rd. Co. v. Muscoda Local No. 123, 321 U. S. 590, 64 S. Ct. 698, 88 L. Ed. 949, 152 A. L. R. 1014; Jewell Ridge Coal Corp. v. Local No. 6167, 325 U. S. 161, 65 S. Ct. 1063, 89 L. Ed. 1534; and Anderson v. Mt. Clement Pottery Co., 328 U. S. 680, 696, 66 S. Ct. 1187, 90 L. Ed. 1515, had been considered as incidental to and included in the productive work and compensated for by the rate of pay on the particular job. The first requisite, then, for the existence of a contract between the parties to pay for these particular activities, namely, a meeting of the minds, was completely lacking. The transactions in controversy fall squarely within the situation described in the findings and declaration of policy of the Congress made in §1 (a) (5) of the Portal-to-Portal Act, 29 U. S. C., §251 (a) (5), 29 U. S. C. A. §251 (a) (5), namely, that if this recovery is allowed, it will give payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in.
>
> * * * * * * * *

"The Portal-to-Portal Act, which became law subsequent to the enactment of the Fair Labor Standards Act, was framed with specific reference to activities such as those involved herein. As has often been repeated, it was passed in order to bar the innumerable claims that were being filed under the Fair Labor Standards Act in order to take advantage of the decisions in Tennessee Coal, Iron & Rd. Co. v. Muscoda Local 123; Jewell Ridge Coal Corp. v. Local No. 6167; and Anderson v. Mt. Clemens Pottery Co., *supra*. Appellants in effect ask us to read these interpretations into the contract in suit, although with certain exceptions the Portal-to-Portal Act expressly repealed them. Seese v. Bethlehem Steel Co., 4 Cir., 168 F. (2d) 58, 62. Such a construction would nullify both the purpose and the provisions of the Portal-to-Portal Act. There being no allegation or proof of the existence of an express contract or custom to pay for the activities described in the complaint, they are barred. The District Court had no jurisdiction of them, 29 U. S. C., §252(d), 29 U. S. C. A. §252(d), and a cause of action is not stated."

Newsom v. E. I. Du Pont De Nemours & Co. (C. C. A. 6), 173 F. 2d 856, 858, 859, 860.

Galvin, et al. v. National Biscuit Co. (S. D., N. Y.), 82 Fed. Supp. 535.

Suit for overtime compensation. Motion to dismiss was interposed by defendant for lack of jurisdiction, and in the alternative, motion for summary judgment. The complaint alleged that the contract between the union and the defendant provided for a definite eight hour shift for which they were paid a definite amount, and also provided for compensation for fifteen minutes before the start of the shift for dressing, that it took more than fifteen

minutes, to wit, thirty minutes; that by custom and practice, the defendant permitted them to leave five minutes before the end of the shift for the purpose of washing up and changing their clothes; that it took more than five minutes to wash and change, and overtime was sought for fifteen minutes for dressing time additional to that which they were paid for, and for time spent in washing and dressing after the shift.

The Court dismissed the action with reference to the claim for their postliminary activities, saying in part:

> "Assuming plaintiffs' allegations of fact to be true, two questions are presented:
>
> "(1) where a postliminary activity was made compensable by custom but only when engaged in during a specified period of the shift—here the last five minutes—did the time spent in that activity outside of that period thereby become compensable?
>
> "(2) where a preliminary or postliminary activity was by contract made compensable for a specified length of time (here 15 minutes for clothes-changing), did any time spent in that activity in excess of the specified length of time thereby become compensable?
>
> "Plaintiffs argue that after November 1, 1944, clothes-changing was an activity compensable by an express provision of a written contract, 29 U. S. C. A. §252(a) (1); that both before and after that date certain postliminary activities were compensable by custom, 29 U. S. C. A. §252(a) (2); that in calculating employed time, all the time during which an employee engaged in a compensable activity must be included, 29 U. S. C. A. §252(b); that if employed time is so calculated, the defendant will be found liable for unpaid overtime compensation."

The Court then set forth Section 2(b) of the Portal Act and the Conference Report, a portion of which has been quoted in our brief, saying:

> "In the light of the illustration contained in the Conference report, the first question here presented must be answered in the negative. Insofar as plaintiffs' claim is based on the allegation that both before and after the 1944 contract it was the custom to allow employees to suspend five minutes before the end of the shift for postliminary activities such as washing up, it is clearly proscribed by the statute."

Galvin, et al. v. National Biscuit Co. (S. D., N. Y.), 82 Fed. Supp. 535, 536, 537.

Hutchings v. Lando (S. D., N. Y.), 83 Fed. Supp. 615.

Motion to dismiss granted. The plaintiffs, after the Fair Labor Standards Act, amended by alleging:

> " 'That at all times hereinafter mentioned, the above activities of the plaintiff were compensable under the express provisions of the employment agreement between the plaintiff and defendant in effect at the time of such activities, and such activities were enjoyed in during the portion of the day with respect to which they were so made compensable.' "

In granting the motion to dismiss, the Court, citing a great number of cases, said:

> "The facts required by Section 2(a) (1, 2) of the Portal-to-Portal Act are jurisdictional and a complaint failing to allege them must be dismissed as defective. Battaglia, *et al.* v. General Motors Corporation, 2 Cir., 169 F. 2d 254.

"A general allegation in the language of the statute that activities were compensable under an express provision of the contract, without setting forth the contract or particular provision thereof or facts in support of such allegation is insufficient to cure the jurisdictional defect."

Hutchings v. Lando (S. D., N. Y.), 83 Fed. Supp. 615, 616.

Berkowitz v. All Service Laundry Corp., 87 N. Y. S. 2d 187, 188, 189.

Plaintiffs, after the Portal Act, amended their complaint by alleging:

"'20. That the employment of the plaintiff for work weeks in excess of the applicable maximum hours prevailing under Section 7 of the Act without compensating him for such excess hours at rates not less than 1½ times the regular rates at which he was employed, was in violation of Section 7 of the Act, and of the custom or practice in effect during said period at defendants' places of business, and of the express provision of a contract between the plaintiff and defendants.'"

In granting the motion to dismiss, the Court said:

"The rule prevailing in the Federal courts appears to be that a cause of action based upon the Fair Labor Standards Act of 1938, as amended by the Portal-to-Portal Act, must affirmatively allege and definitely establish by facts the right to maintain such action and the jurisdiction of the Court. A mere allegation in the language of the statute of such

right and of such jurisdiction, without alleging facts in support thereof, is insufficient. Sadler v. W. S. Dickey Clay Mfg. Co., D. C., 78 F. Supp. 616, 618. There the Court said, 78 F. Supp. at page 618:

" 'Under the established rule, that a plaintiff suing in a Federal Court must show in his petition affirmatively and distinctly, the existence of whatever is essential to Federal Jurisdiction, we believe that under Section 2(d), *supra,* of the Portal-to-Portal Act of 1947, plaintiffs, relying upon a contract, must allege the express provision of such contract that would authorize the payment of compensation for the particular activity claimed; or if relying upon a custom, that he should allege facts from which the custom or practice may be inferred that would make such activities compensable. If a plaintiff does not do so, the Court, on having such defect called to its attention, upon discovering the same may dismiss the case, * * *.'

"To the same effect see Lockwood v. Hercules Powder Co., D. C., 78 F. Supp. 716; also Boerkoel v. Hayes Mfg. Corporation, D. C., 76 F. Supp. 771.

"The same rule obtains in our State Courts. It must appear that all the facts upon which a cause of action depends, as stated in the statute, are alleged in the complaint. Pleading the bare language of the statute is clearly defective. Emanuele *et al.* v. Rochester Packing Co., Inc., 182 Misc. 348, 350, 45 N. Y. S. 2d 164, 166; Broderick v. Lemkau-Kidd Corporation, 267 App. Div. 91, 44 N. Y. S. 2d 505."

Berkowitz v. All Service Laundry Co., 87 N. Y. S. 2d 187, 188, 189.

Schelling v. Star Switchboard Company (N. Y.), (not yet officially reported), 16 Labor Cases 65,230.

The Court, in granting the motion to dismiss, said:

"The original complaint was dismissed because it did not allege 'compensability by contract, custom or practice.' The amended complaint now before the Court is identical with the complaint already dismissed except that it alleges in paragraphs 5, 13, 21 and 29 (in each of the four causes) 'that the said services and work performed * * * were performed pursuant to contract, custom and practice.' It has been held that this allegation, without facts to show such a contract, custom or practice, is insufficient (Berkowitz v. All Service Laundry Corp'n, 87 N. Y. Supp. (2d) 187, 189 (16 Labor Cases Par. 64,977)). The motion to dismiss is granted."

Schelling v. Star Switchboard Company (not yet officially reported), 16 Labor Cases 65,230, pp. 75,861-2.

III.

Additional Decisions That When Lack of Jurisdiction Appears on the Face of the Record, It Is the Duty of the Court to Dismiss the Case.

Fisch, et al. v. General Motors Corporation;

Bateman v. Ford Motor Co. (C. C. A. 6), 169 F. 2d 266, 269 (certiorari denied 335 U. S. 902).

The second of these cases has been cited in our brief as affirming the decision of the District Court from which we quoted.

The appeals in the two suits were consolidated. Both actions were instituted after the *Mount Clemens* decision for walking and dressing time. After the effective date of the Portal Act the complaints were amended by alleging that plaintiffs' services were made compensable by a written contract between the respective employers and the Government of the United States wherein each employer defendant agreed that it would fully comply with all federal laws and regulations including the Fair Labor Standards Act. A motion to dismiss was granted, the District Court holding, as shown in our brief, that the alleged contract did not meet the requirements of the Portal Act. In our brief (page 18), we quoted from a portion of the decision of the District Court in support of our contention that the object which Congress had in withdrawing jurisdiction from all courts of suits for activities made non-compensable by Section 2 was the express purpose of preventing the unnecessary waste of the time of the courts and the tremendous cost to litigants that would be involved in such trials. The Circuit Court

of Appeals in affirming the judgment of dismissal of the District Court said, in part (citing a large number of cases):

> "We cannot yield to plaintiffs' contention that the court's action on the motion to dismiss was premature. If it appeared to the satisfaction of the court *at any time* after the suits were brought that they did not really and substantially involve a dispute or controversy properly within its jurisdiction, *it was its duty to proceed no further and to dismiss the suit.*" (First italics the Court's.)

Fisch, et al. v. General Motors Corporation,

Bateman v. Ford Motor Co. (C. C. A. 6), 169 F. 2d 266, 269 (certiorari denied 335 U. S. 902).

Johnson v. Park City Consolidated Mines Co. (D., Mo.), 73 Fed. Supp. 852.

In granting a motion to dismiss for lack of jurisdiction where the complaint merely contained a general allegation that overtime was to be paid for, the Court said in part:

> "This action involves a large number of records and employees. It would require expenditure of large sums of money and time to get ready for trial and the trial would be long, in fact might even call for a master. Why go through such procedure, as suggested by plaintiffs, to reach a position that is now obvious from the record. If plaintiffs can prove a contract or custom as called for by the amended Act *it should not be kept secret until the trial. Likewise if they cannot produce such evidence that should not be kept secret until the trial.*"

Johnson v. Park City Consolidated Mines Co. (D. Mo.) 73 Fed. Supp. 852, 857.

Battaglia v. General Motors Corporation (C. C. A. 2), 169 F. 2d 254 (certiorari denied 335 U. S. 887).

Suit was for overtime compensation for preliminary and postliminary activities. The suit was filed following the *Mount Clemens* decision, and after the Portal Act motion to dismiss was interposed. The Court offered to allow plaintiffs to amend. This they declined, standing on their claim that the Portal Act was unconstitutional. In affirming the dismissal, the Second Circuit Court of Appeals said in part:

> "It was the duty of the court to ascertain whether it had jurisdiction before proceeding to hear and decide the case on the merits. Emmons v. Smitt, 6 Cir. 149 F. 2d 869, certiorari denied, 326 U. S. 746, 66 S. Ct. 59, 90 L. Ed. 446; *Ex parte* McCardle, 7 Wall. 506, 19 L. Ed. 264; see Smith v. McCullough, 270 U. S. 456, 459, 46 S. Ct. 338, 70 L. Ed. 682; Rule 12 (h), Federal Rules of Civil Procedure, 28 U. S. C. A. following §723c. The allegation of facts to show jurisdiction in the district court is a prerequisite to the trial of an action on the merits."
>
> *Battaglia v. General Motors Corporation* (C. C. A. 2), 169 F. 2d 254, 256 (certiorari denied 335 U. S. 887).